Tetuan Amin-Tan & Co (suing as a firm) v Tetuan Harjinder & Associates (sued as a firm)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-219–05 OF 2020
HAYATUL AKMAL J
3 APRIL 2024

Tort — Negligence — Professional negligence — Plaintiff's action for breach of fiduciary duty struck out by High Court for failure of legal firm representing plaintiff to comply with timeline to provide further and better particular specified in consent order — Plaintiff sued legal firm for professional negligence — Whether plaintiff loss right to pursue action and to recover its claim against defendants — Whether plaintiff proved recoverable loss — Whether loss claimed by plaintiff was negligible and speculative — Whether plaintiff discharged burden of proof to establish claim against legal firm — Courts of Judicature Act 1964 ss 3 & 68(1)(b) — Evidence Act 1950 ss 101, 102 & 103 — Rules of Court 2012 O 3 r 5, O 42 r 6(1), O 45 r 6(1) & O 92 r 4

The parties in the present suit were legal firms registered under the Legal Profession Act 1976. The defendant had represented the plaintiff in a civil suit ('Suit 208') against its former partners and legal assistants ('the defendants in Suit 208') for alleged breach of fiduciary duty resulting in losses to the plaintiff. The plaintiff alleged that the defendant had caused Suit 208 to be struck off by the High Court for incompliance with the timeline to provide further and better particulars to the defendants in Suit 208 secured through a consent order ('the consent order') before the court. The timeline requirement by the High Court came with an unless order. Because the plaintiff failed to meet the court-ordered deadline, the court enforced the unless order and struck out Suit 208 without hearing the merits of the plaintiff's suit. Aggrieved, the plaintiff brought the present action against the defendant premised on breach of contract and professional negligence, claiming: (a) their purported loss of a right to pursue an action against the defendants in Suit 208; and (b) their purported right to recover their claim in Suit 208 against the named defendants ('the plaintiff's claim').

Held, dismissing the plaintiff's claim with costs of RM25,000 to be paid to the defendant within 30 days from the date of the court's order:

(1) In cases involving a professional duty of care, the standard of negligence differed from that of a general duty of care. It was the practice in this genre of cases that a relevant expert in the field needed to be called to establish the minimum bar for the standard of care applicable to

professionals to enable the court to determine from the evidence adduced at the trial that the defendant had failed to meet that professional bar for the standard of care expected of a professional or in the present case, a practising legal practitioner. In professional negligence, there were four requirements: (a) the duty of care was owed to the plaintiff; (b) there was a breach of that duty; (c) the plaintiff suffered actual damages; and (d) the error was one that neither reasonably competent member of the relevant profession would have made (see paras 11(c)(i) & 11(c)(iv)).

(2) Even though s 68(1)(b) of the Courts of Judicature Act 1964 ('the CJA') stated that no appeal shall be brought to the Court of Appeal where the judgment or order was made by consent of parties, it did not spell the end of the purported recovery process against the defendants named in Suit 208. Further, the consent order also did not prohibit refiling the action. It was trite law that unless and until the claim was disposed of on the case's merits, there was no bar or encumbrance for the plaintiff to file a fresh action on substantially similar grounds against the named defendants in Suit 208. Section 3 of the CJA made it clear that 'decision' meant judgment, sentence or order but did not include any ruling made in the course of a trial or hearing of any cause or matter which did not finally dispose of the rights of the parties. Finality on the merits and issues of the plaintiff's claim in Suit 208 had neither been canvassed nor ventilated. Further, the court had the discretion to extend time under O 3 r 5, O 42 r 6(1) read together with O 45 r 6(1) and O 92 r 4 of the Rules of Court 2012. Res judicata also could not set in when a final determination on the merits of the claim had not been thoroughly canvassed and ventilated. In the circumstances, the plaintiff could not claim they had exhausted all their legal resources in pursuing the named defendants in Suit 208 (see para 12(b)).

(3) Based on the materials before the court, as produced by the plaintiff, who was duty-bound to prove its losses, the court was unconvinced of the compelling value of the evidence. The prospect of recovery from those files and materials was negligible. Limitations and contentious legal impairment encumbered the attempted recovery. It was a trite law that the court would not act on speculation but only on proven facts. In the present case, the court found that the losses claimed by the plaintiff were purely speculative. The plaintiff failed to convince the court of the damage they allegedly suffered that could be attributed to the defendant. The court was guided that the plaintiff was duty-bound to prove recoverable losses before an award of damages could be made (see paras 15(a) & 15(c)–15(d)).

(4) It was trite in law that the plaintiff shouldered the burden of proof in establishing its case. It was not the defendant's duty to disprove it. The evidentiary burden was that those who alleged a fact were duty-bound to

prove it. The plaintiff had failed to discharge its burden of proof to establish the claim set out in its statement of claim as stipulated under ss 101, 102 and 103 of the Evidence Act 1950. As the court had observed above, the plaintiff had failed to adduce the required compelling evidence to tilt the scale of evidence in its favour (see paras 11(a)–11(b)).

[Bahasa Malaysia summary

Pihak-pihak dalam saman semasa adalah firma-firma guaman yang didaftarkan di bawah Akta Profesion Undang-Undang 1976. Defendan telah mewakili plaintif dalam satu saman sivil ('Saman 208') terhadap bekas rakan kongsi dan pembantu undang-undang plaintif ('defendan-defendan dalam Saman 208') kerana dakwaan melanggar kewajipan fidusiari yang mengakibatkan kerugian kepada plaintif. Plaintif mendakwa bahawa defendan telah menyebabkan Saman 208 dibatalkan oleh Mahkamah Tinggi kerana tidak mematuhi garis masa untuk memberikan jawapan lebih lanjut dan butir-butir yang lebih baik kepada defendan-defendan dalam Saman 208 yang diperoleh melalui perintah persetujuan ('perintah persetujuan tersebut') di hadapan mahkamah. Keperluan garis masa oleh Mahkamah Tinggi tersebut datang bersama 'unless order'. Oleh kerana plaintif gagal mematuhi tarikh akhir yang diperintahkan oleh mahkamah tersebut, mahkamah menguatkuasakan 'unless order' tersebut dan membatalkan Saman 208 tanpa mendengar merit saman plaintif. Terkilan, plaintif membawa tindakan semasa terhadap defendan berdasarkan pelanggaran kontrak dan kecuaian professional bagi menuntut: (a) kehilangan hak mereka yang dikatakan untuk meneruskan tindakan terhadap defendan-defendan dalam Saman 208; dan (b) hak mereka yang dikatakan untuk mendapatkan semula tuntutan mereka dalam Saman 208 terhadap defendan-defendan yang dinamakan ('tuntutan plaintif').

Diputuskan, menolak tuntutan plaintif dengan kos sebanyak RM25,000 dibayar kepada defendan dalam masa 30 hari dari tarikh perintah mahkamah:

(1) Dalam kes-kes yang melibatkan kewajipan berjaga-jaga profesional, standard kecuaian adalah berbeza daripada kewajipan berjaga-jaga yang biasa. Ia adalah amalan dalam genre kes seperti ini bahawa pakar yang berkaitan dalam bidang tersebut perlu dipanggil untuk mewujudkan tahap minimum bagi standard berjaga-jaga yang terpakai kepada profesional bagi membolehkan mahkamah menentukan daripada keterangan yang dikemukakan pada perbicaraan bahawa defendan telah gagal memenuhi tahap profesional tersebut untuk standard berjaga-jaga yang diharapkan daripada seorang profesional atau dalam kes semasa, seorang pengamal undang-undang yang beramal. Dalam kecuaian profesional, terdapat empat keperluan: (a) kewajipan berjaga-jaga terhadap plaintif; (b) terdapat pelanggaran kewajipan tersebut; (c) plaintif mengalami kerugian sebenar; dan (d) kesilapan tersebut adalah kesilapan yang tidak mungkin dilakukan oleh ahli profesion

berkaitan yang munasabah (lihat perenggan 11(c)(i) & 11(c)(iv)).

(2) Walaupun s 68(1)(b) Akta Mahkamah Kehakiman 1964 ('AMK') menyatakan bahawa tiada rayuan boleh dibawa ke Mahkamah Rayuan apabila penghakiman atau perintah itu dibuat dengan persetujuan pihak-pihak, ia tidak menyatakan penamat bagi proses pemulihan yang dikatakan itu terhadap defendan-defendan yang dinamakan dalam Saman 208. Tambahan pula, perintah persetujuan tersebut tidak menghalang pemfailan semula tindakan. Adalah menjadi undang-undang yang mantap bahawa melainkan dan sehingga tuntutan tersebut dilupuskan berdasarkan merit kes, tidak ada halangan atau bebanan bagi plaintif untuk memfailkan tindakan baharu atas alasan yang hampir sama terhadap defendan-defendan yang dinamakan dalam Saman 208. Seksyen 3 AMK menjelaskan bahawa 'keputusan' bermaksud penghakiman, hukuman atau perintah tetapi tidak termasuk apa-apa ketetapan yang dibuat dalam perjalanan sesuatu perbicaraan atau pendengaran apa-apa kausa atau perkara yang tidak melupuskan hak pihak-pihak secara muktamad. Kemuktamadan mengenai merit dan isu tuntutan plaintif dalam Saman 208 masih belum dikaji atau dibicarakan. Selanjutnya, mahkamah mempunyai budi bicara untuk melanjutkan masa di bawah A 3 k 5, A 42 k 6(1) yang dibaca bersama-sama dengan A 45 k 6(1) dan A 92 k 4 Kaedah-Kaedah Mahkamah 2012. Res judicata juga tidak terpakai apabila penentuan muktamad mengenai merit tuntutan tersebut belum dikaji dan dibicarakan secara menyeluruh. Dalam keadaan tersebut, plaintif tidak boleh mendakwa bahawa mereka telah kehabisan semua sumber undang-undang mereka untuk membuat tuntutan ke atas defendan-defendan yang dinamakan dalam Saman 208 (lihat perenggan 12(b)).

(3) Berdasarkan keterangan-keterangan di hadapan mahkamah, seperti yang dikemukakan oleh plaintif, yang bertanggungjawab untuk membuktikan kerugiannya, mahkamah tidak yakin dengan nilai keteguhan keterangan tersebut. Prospek pemulihan daripada fail-fail dan keterangan yang berkaitan adalah sangat kecil. Had masa dan kekangan undang-undang yang dipertikaikan menghalang percubaan pemulihan tersebut. Sudah menjadi suatu undang-undang yang mantap bahawa mahkamah tidak akan bertindak atas spekulasi tetapi hanya berdasarkan fakta yang terbukti. Dalam kes semasa, mahkamah mendapati bahawa kerugian yang dituntut oleh plaintif adalah spekulatif semata-mata. Plaintif gagal meyakinkan mahkamah tentang kerugian yang didakwa dialaminya yang boleh dikaitkan dengan defendan. Mahkamah dibimbing oleh prinsip bahawa plaintif bertanggungjawab untuk membuktikan kerugian yang boleh didapati sebelum award ganti rugi boleh dibuat (lihat perenggan 15(a) & 15(c)–15(d)).

(4) Sudah menjadi undang-undang yang mantap bahawa plaintif memikul

beban pembuktian dalam membuktikan kesnya. Bukan kewajipan defendan untuk menafikannya. Beban buktinya ialah mereka yang mendakwa sesuatu fakta adalah wajib untuk membuktikannya. Plaintif telah gagal untuk melepaskan beban pembuktiannya untuk membuktikan tuntutan yang dinyatakan dalam pernyataan tuntutannya seperti yang ditetapkan di bawah ss 101, 102 dan 103 Akta Keterangan 1950. Seperti yang diperhatikan oleh mahkamah di atas, plaintif telah gagal mengemukakan keterangan kukuh yang diperlukan bagi memberatkan neraca keterangan untuk memihak kepadanya (lihat perenggan 11(a)–11(b)).]

Cases referred to

Allied Maples Group Ltd v Simmons & Simmons (a firm) [1995] 1 WLR 1602, CA (refd)

Arthur JS Hall & Co (a firm) v Simmons Barrat [2002] 1 AC 615, CA (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Bank Bumiputra Malaysia Bhd lwn Tetuan Wan Marican Hamzah & Shaik & Lain-Lain [1994] 1 MLJ 124, HC (refd)

Blyth v Birmingham Waterworks Co (1856) 11 Ex 781 (refd)

Brown v Barker Austin [1998] PNLR 493 (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90, HC (refd)

Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals [2013] 2 MLJ 29, CA (refd)

Donoghue v Stevenson [1932] AC 562, HL (refd)

Dr Guan Suk Chyn v Kartar Kaur a/p Jageer Singh [2014] 1 AMR 200, CA (refd)

Government of Malaysia & Ors v Jumat bin Mahmud & Anor [1977] 2 MLJ 103, FC (refd)

Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139, FC (refd)

Kumarappan @ Thannirmalai a/l KM Palaniappan v Kiranjit Kaur d/o Jagjit Singh (wakil diri Suresh Thanabalasingam) & Ors [2022] MLJU 3389, HC (refd)

Kuwait Finance House Malaysia Bhd v Obnet Sdn Bhd & Ors and another suit [2016] MLJU 1843; [2016] 1 LNS 1116, HC (refd)

Lee Kuang Guat (suing as the father of the decased, Lee Chu Ling) v Chiang Woei Chien (practicing as Chiang Chambers, Advocates and Solicitors) [2021] 3 MLJ 505, CA (refd)

Lim Soh Wah & Anor v Wong Sin Chong & Anor & Another Appeal [2001] 2 CLJ 344, CA (refd)
Messrs Albert Ding, Lee & Partners v Cho Chooi Mei [2020] 10 MLJ 180, HC (refd)
Malayan Banking Bhd v Tan Soek Phee & Ors and another appeal [2023] 5 MLJ 507; [2023] CLJU 1555, CA (folld)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385; [2002] 1 CLJ 645, FC (folld)
Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors [1981] 2 MLJ 27, FC (refd)
Ngan Siong Hing v RHB Bank Bhd [2014] 2 MLJ 449, CA (refd)
Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor [2020] 4 MLJ 380, CA (refd)
Ong Mei Lean v Loh Sim Seng [2021] MLJU 2082, CA (refd)
Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd [2015] 1 MLJ 490, CA (folld)
Penang Port Commission v Kanawangi s/o Seperumaniam [1996] 3 MLJ 427, CA (refd)
Perry v Raley Solicitors [2019] UKSC 5, SC (refd)
Perumahan Farlim (Pg) Sdn Bhd & Ors v Cheng Hang Guan & Ors [1989] 3 MLJ 223, SC (refd)
Phuah Beng Chooi @ Koh Kim Kee (P) & Ors v Koh Heng Jin @ Koh Heng Leong & Ors [2007] 2 MLJ 458, HC (refd)
Selvaduray v Chinniah [1939] 1 MLJ 253 (refd)
Sharif and others v Garrett & Co (a firm) [2002] 3 All ER 195, CA (folld)
Shearn Delamore & Co v Sadacharamani a/l Govindasamy [2017] 1 MLJ 486, CA (refd)
Supramaniam a/l Kasia Pillai v Subramaniam a/l Manickam [2017] MLJU 1590, CA (refd)
Swamy v Mathews & Anor [1968] 1 MLJ 138, FC (refd)
Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor [2017] 4 MLJ 207, CA (refd)
Wiltopps (Asia) Ltd v Drew & Napier and another [1991] 1 SLR(R) 252, HC (refd)
Wong Kim v Loh Kim Foon [2003] 4 MLJ 535, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 68(1)(b)
Evidence Act 1950 ss 101, 102, 103
Legal Profession Act 1976
Rules of Court 2012 O 1A, O 2 r 1, O 3 r 5, O 45 r 6(1), O 92 r 4
Solicitors Remuneration Order 2005 (repealed by Solicitors' Remuneration Order 2023)
Solicitors' Remuneration Order 2023

Alvin Oh Seong Yew (with Siew Chang Peng) (Sia Siew Mun & Co) for the plaintiff.
Tan Keng Teck (with Ung Zhee Liane) (Lim Kian Leong & Co) for the defendant.

Hayatul Akmal J:

INTRODUCTION

[1] The parties in this suit are legal firms registered under the Legal Profession Act 1976.

[2] The plaintiff's action against the defendant is premised on breach of contract and professional negligence, claiming:

(a) their purported loss of a right to pursue an action against the defendants in Kuala Lumpur Civil Suit No WA-22NCVC-208–04 of 2018 ('Suit 208'); and

(b) their purported right to recover their claim in Suit 208 against the named defendants.

The list of witnesses at the trial is as follows:

(a) the plaintiff's witnesses:

(i) PW1 Datin Jamilah bt Abu Bakar; and

(ii) PW2 Ammar bin Ghalip;

(b) the defendant's witnesses:

(i) SD1 Tengku Haris bin Tengku Rostam; and

(ii) SD2 Harjinder Singh a/l Saudagar Singh.

On 31 January 2024, after considering the facts, all the cause papers, the totality of the evidence adduced at the trial, and the parties' respective arguments, on the balance of probabilities, I found no merit in the plaintiff's suit against the defendant. I dismissed it with a cost of RM25,000 to be paid within 30 days.

Aggrieved, the plaintiff filed this appeal against my decision, and these are my reasons.

BRIEF FACTS

[3] Parties have filed agreed facts, and in narrating the brief facts, I will also refer to a series of correspondences and documents available before me. In examining the evidence at the trial, I found as follows:

(a) both are law firms duly registered under the Legal Profession Act 1976;

(b) the defendant:

(i) had represented the plaintiff in a civil recovery suit in KL HC Suit No WA-22NCVC-208–04 of 2018 (Suit 208) against its former partners and legal assistants for alleged breach of fiduciary duty (under billing, concealment, non-billing, non-collection of billing of one particular client: Prosper Group of Companies) resulting in suspected losses to the plaintiff. The plaintiff founded their action against the former partners and associates under:

(1) breach of fiduciary duties; and

(2) conspiracy to cause loss of profit and damages to the plaintiff;

(ii) the plaintiff discovered this alleged breach in July 2017 after carrying out an internal audit on work related to the former partners/legal assistants (Dato' Tan Bing Hua, Susie Lim Chuan Tin, Norazlina bt Idris, and Neik Chi Ngu); and

(iii) in Suit 208, it was alleged that the client's personnel conspired with the plaintiff's former partners/legal assistants;

(c) the plaintiff asserts that the defendant, in undertaking this civil recovery suit, must ensure that the plaintiff is well informed of the suit's progress and render the appropriate advice pertinent to the circumstances. They are to prosecute Suit 208 for the plaintiff to its conclusion diligently;

(d) the plaintiff alleges that the defendant had caused Suit 208 to be struck off by the High Court for incompliance with the timeline to provide further and better particulars to the former partners/legal assistants in Suit 208 secured through a consent order before the court. The timeline requirement by the High Court came with an unless order;

(e) because the plaintiff failed to meet the court-ordered deadline, the court enforced the unless order on 18 April 2019 and *struck out Suit 208 without hearing the merits of the plaintiff's suit*;

(f) the plaintiff claimed that:

(i) the defendant had agreed to the consent orders for further and better particulars by the former partners/legal assistants without the plaintiff's prior mandate;

(ii) the defendant never disclosed the consent orders to the plaintiff and failed to inform about the unless order;

(iii) the defendant had five months' access to the specific prayers sought by the former partners/legal assistants before entering the consent orders. They should have had the materials ready by then to comply with them;

(iv) the plaintiff only found out Suit 208 was stuck off when told by the defendant sometime on 18 April 2019 that Suit 208 had been struck for in default of complying with the consent orders, but was advised by the defendant that an appeal can be lodged over the matter as the merits of the suit had yet to be determined;

(v) the plaintiff discovered from a file search at the High Court that before the striking out, the defendant had filed an application for an extension of time ('EOT') on 19 November 2018 to comply with the consent orders (again without the plaintiff's mandate) but was denied, leading to the striking out of Suit 208;

(vi) the affidavit in support of that EOT application listed unreasonable grounds for the purported delay:

(a) office closed for Deepavali;

(b) the partner, Tengku Haris was away for umrah; and

(c) Mr Harjinder himself was down with some ailment;

(vii) in a meeting on 30 April 2019, the defendant finally admitted to the plaintiff that the striking out was caused by non-compliance with the consent orders;

(g) the plaintiff listed down the defendant's alleged negligence:

(i) failed to give prompt and regular updates on the status of Suit 208;

(ii) was untruthful about the consent orders by claiming that a solicitor, En Ammar Ghalib, from the plaintiff's firm, had agreed to it; and

(iii) even if the said solicitor had agreed (that is denied), the defendant should have duly advised on adequate compliance within time;

(h) due to the striking out of Suit 208, the plaintiff suffered losses by not being able to pursue recovery of RM2.1m against the former partners/legal assistants in Suit 208. The plaintiff argued that evidence at the trial shows that the defendant's conduct of Suit 208 had fallen below the standards of a reasonable competent solicitor:

(i) failed to update the plaintiff on the case status regularly;

(ii) failed to obtain the prior mandate for the plaintiff before agreeing to record the consent orders;

(iii) failed to act on the consent orders diligently;

(iv) was dishonest in the conduct of Suit 208;

(v) placed Suit 208 in an unsalvageable position, where the plaintiff has lost *its chance* of recovery from the former partners/legal assistants over their alleged breach of fiduciary duties to the plaintiff;

(vi) the application for reinstatement and its dismissal, the application of EOT and its dismissal is not the correct procedure to take since:

(1) the court has no jurisdiction to entertain an EOT when parties had agreed in a consent order, which in the present case was endorsed with an unless order;

(2) the consent order denies the court discretion to reinstate after striking out;

(3) the Courts of Judicature Act 1964 stipulates in s 68(1)(b) that no appeal shall be brought to the Court of Appeal where the judgment or order is made by the parties' consent; and

(4) therefore, the appeal on the reinstatement and EOT would have been futile, leading to its withdrawal by the plaintiff;

(i) therefore, the plaintiff claims against the defendant the s*peculated recovery of RM2.1M in Suit 208*, general damages, exemplary damages, aggravated damages, interest and cost;

(j) in denying the claim, the defendant took the position that:

(i) the plaintiff must prove actual damage/loss caused by the defendant's alleged breach of professional duty. Without that proof, the action will not be sustainable;

(ii) there is no compelling evidence that the plaintiff has suffered actual loss caused by this alleged breach of professional duty;

(iii) the plaintiff's withdrawal of the appeals constituted an intervening act that broke the chain of causation (*novus actus interveniens*);

(iv) the merits of the claim on the 36 files have yet to be canvassed and ventilated by the court, with little or no prospect of success in recovery. The plaintiff did not call any independent expert to verify the prospect of success in the said 36 suits;

(v) it was argued that the loss of chance must be real and substantial rather than negligible.

(vi) the 36 file billings cited in Suit 208 are saddled with limitations, re-billing, and unjustified billings, which Prosper Group of Companies is contesting;

(vii) the legal manager of Prosper Group of Companies had offered to pay

RM428,888 for 20 selected files even though they were time-barred. The legal manager, however, objects to the revision of new bills. The matter has long since passed, and the client was unsure whether they could locate the files still to verify the matter; and

(viii) taking this cue from the client, the plaintiff elected to reissue bills for the first 20 files and 16 additional files, which led to the defendant changing their position by pleading limitation on all claims by the plaintiff. Being fully aware of this position before filing Suit 208, in the circumstances, there can be a loss of chance to recover from the former client (Prosper Group of Companies).

THE PARTIES ARGUMENTS

[4] I have observed and considered the parties' arguments in canvassing and ventilating their positions in their respective enclosures. In a nutshell:

THE PLAINTIFF

[5] The plaintiff canvassed and ventilated their claim as follows:

(a) the defendant in prosecuting Suit 208 breached the duty of care below the standard of a reasonably competent solicitor, leading to it being struck out by the court:

(i) they entered into specific consent order endorsed with an unless order for discovery of documents (further and better particulars) without having the plaintiff's mandate to do so;

(ii) Suit 208 was struck out for failing to adhere to the dateline imposed in the consent orders;

(iii) the defendant applied for an extension of time ('EOT') without the plaintiff's knowledge or mandate, not knowing it was the wrong mode to resuscitate Suit 208. The court dismissed the EOT application on 12 September 2019, leading to an appeal being lodged for the reinstatement;

(iv) the plaintiff subsequently withdrew both the EOT and reinstatement appeals; and

(v) the plaintiff claimed they had a reasonable prospect of success in Suit 208 had it been trialled. Allowing the said suit to be struck out impaired the plaintiff's recovery of damages or losses from its former partners and associates;

(b) it was argued that the defendant, as the solicitor:

(i) failed to disclose the impugned consent orders timely;

(ii) failed to advise on the failure to comply;

(iii) the defendant failed to obtain the plaintiff's mandate before agreeing to the impugned consent orders. None of the WhatsApp chats between the parties show that the defendant had duly informed the plaintiff of the consent orders with the unless order: NOP, p 512, lines 20–24; p 510, lines 21–23;

(iv) failed to comply with the impugned consent orders, causing Suit 208 to be struck out: NOP, p 522, lines 6–34;

(v) this impaired the plaintiff's chances of recovering damages in Suit 208;

(vi) the defendant's conduct in Suit 208 is well below the standards of a reasonably competent solicitor;

(vii) failure to provide timely updates on the status and progress of the proceeding in Suit 208. The defendant was dishonest and untruthful in their dealings with the plaintiff in Suit 208. They had concealed from the plaintiff's:

(1) the consent orders are with the unless order; and

(2) concealed the existence of the EOT application;

(viii) the defendant's breach of duty makes Suit 208 unsalvageable. Agreeing to the consent orders leaves no room for manoeuvre once they lapse or when the terms are not complied with. Parties are bound to the terms of the said order as agreed: *Phuah Beng Chooi @ Koh Kim Kee (P) & Ors v Koh Heng Jin @ Koh Heng Leong & Ors* [2007] 2 MLJ 458. The court has no power to vary a consent judgment: *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143.

The defendant owes a duty of care to the plaintiff in Suit 208 undertaken: *Lee Kuang Guat (suing as the father of the deceased, Lee Chu Ling) v Chiang Woei Chien (practicing as Chiang Chambers, Advocates and Solicitors)* [2021] 3 MLJ 505. They are to keep the plaintiff duly appraised of the status of the proceedings in Suit 208: *Lim Soh Wah & Anor v Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344. There is an overriding duty to be honest in dealing with the plaintiff over Suit 208: *Messrs Albert Ding, Lee & Partners v Cho Chooi Mei* [2020] 10 MLJ 180;

(c) evidence at the trial by DW1 and DW2 establishes that:

(i) the defendant had perused all documents before filling Suit 208: NOP, p 483, lines 2–7;

(ii) the defendant had advised on the appropriate causes of action in Suit 208: NOP, p 490, lines 8-–11; lines 13–17; L58, NOP, p 491, lines 11–15;

(iii) limitation has not barred the action in Suit 208: NOP, p 494, lines 1–12;

(iv) the named defendants in Suit 208 are the proper parties to sue: NOP, p 491, lines 22–25;

(v) the defendant advised the plaintiff that the consent judgment recorded with Suzy Lim (one of the former partners) in KL HC Suit No WA-22NCVC-200–04 of 2017 (Suit 200) will not compromise Suit 208: NOP, p 496, lines 25–28;

(vi) they were aware of the consequences of incompliance with the consent orders endorsed with an unless order: NOP, p 482, lines 3–13, 15–18; p 503, lines 16–34; p 518, line 14; p 521, line 30;

(vii) DW1 and DW2, who were partners in the legal firm at the time, are jointly liable for the firm's alleged negligence, regardless of who was in charge or had conducted Suit 208; and

(viii) evidently, the defendant had failed to meet the terms of the consent orders that they agreed upon, and personal excuses cannot exonerate them from the blame and responsibility in Suit 208: NOP, p 455, lines 19–23; p 467, lines 13–18.

(d) it was argued that the defendant's advice to apply for reinstatement was incorrect since the parties consented to the fact that failure to comply with the terms of the orders would result in an automatic dismissal of Suit 208. This leaves little room for the sitting judge's discretion to reinstate the impugned suit: *Wiltopps (Asia) Ltd v Drew & Napier and another* [1991] 1 SLR(R) 252; and *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393;

(e) s 68(1)(b) of the Courts of Judicature Act 1964 disallow any appeal from a consent order. Filing a fresh suit against the defendants Suit 208 are in the circumstances caught by res judicata: *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783. Refiling a fresh action would incur further costs without any reasonable prospect of success;

(f) in the circumstances, the plaintiff has suffered a substantial loss of chance to pursue its claim against the defendants in Suit 208: *Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd* [2015] 1 MLJ 490 (CA) quoting Brown Simon LJ in *Brown v Barker Austin* [1998] PNLR 493 that the court is facing greater difficulty in discerning the strength of the plaintiff's original claim. Such difficulty should not count against the plaintiff but rather against the negligent solicitors. The Court of Appeal ruled that once the plaintiff establishes a loss of chance, the court should proceed to assess the value of the loss of chance based on the evidence tendered in the court;

(g) for the present case, the plaintiff is claiming the loss of opportunity to seek damages against the defendants in Suit 208, totalling RM2,100,277.22, based on the documents tendered (CBOD Part B *Jld* 2–8). There is no evidence, as asserted by the defendant, that Suit 208 is bound to fail. The defendant's negligence has denied the plaintiff an opportunity to ventilate Suit 208 against the named defendants fully. The limitation raised by the defendant is untenable in a case founded on fraud;

(h) there is no break in the chain of causation alleged by the defendant on the withdrawal of the EOT and Reinstatement appeals, as they were deemed to fail from the outset;

(i) there is no break in the chain of causation alleged by the defendant on the withdrawal of the EOT and reinstatement appeals, as they were deemed to fail from the outset;

(j) the plaintiff alluded to the fact that DW1 had been disbarred on 23 September 2023, but no reason for the disbarment was provided. Therefore, it was argued that the evidence of DW1 should be taken with an abundance of caution.

I find this issue inconsequential and irrelevant to the present proceeding and accord it no weight.

In the circumstances, the plaintiff prays for an order in terms of its prayers in the statement of claim with costs.

THE DEFENDANT

[6] The defendant canvassed and ventilated their defence as follows:

(a) it was asserted that:

(i) whether the plaintiff is entitled to claim against the defendant for the loss of chance to recover the claim in Suit 208 against the defendants named in Suit 208 (loss of chance issue); and

(ii) even if there is a finding of negligence (which the defendant denies), whether the plaintiff purportedly broke the chain of causation between that negligence and the loss and/or damage allegedly sustained by the plaintiff (defence of *novus actus interveniens*);

(b) the plaintiff must prove actual damage/loss caused by the defendant's

alleged breach of professional duty. Without that proof, the action must fail and cited *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486 (CA); *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207. The defendant also pointed out that the law is trite in a claim for professional negligence; the plaintiff is duty bound to prove recoverable losses before an award of damages can be made: *Penang Port Commission v Kanawangi s/o Seperumaniam* [1996] 3 MLJ 427; *Supramaniam a/l Kasia Pillai v Subramaniam a/l Manickam* [2017] MLJU 1590 (CA) that had observed that the burden of proof is always on the party asserting the claim for damages and that legal burden can only be satisfied when evidence had reached a standard of establishing a prima facie case for the disputing party to rebut. If that evidence had not established a prima facie case, failure to rebut would not amount to having proved its case;

(c) the plaintiff cannot provide compelling evidence that they have suffered actual loss caused by this alleged breach of professional duty. Therefore, the plaintiff's loss of chance to recover from the former partners/legal assistants complained of is misconceived in law and fact. It was asserted that even if the defendant is found negligent, the plaintiff's withdrawal of the appeals constituted an intervening act that broke the causation chain (*novus actus interveniens*);

(d) PW1: Datin Jamilah gave evidence that the plaintiff's loss had a speculative value of RM2.1m from purported legal fees in 36 files that the plaintiff had handled for one particular client, Prosper Group of Companies: IP, A at pp 63–70:

(i) the merits of the claim on the 36 files have yet to be canvassed and ventilated in court, with little or no prospect of success in recovery;

(ii) the plaintiff did not call any independent expert to verify the prospect of success in the 36 suits;

(iii) the court will never entertain speculative damages contingent upon success in recovery proceedings and its enforcement;

(iv) it was argued that the loss of chance must be real and substantial rather than negligible;

(v) the 36 file billings are saddled with limitations, re-billing, and unjustified billings that the plaintiff's client is contesting, primarily that the said bills had been barred by limitation before Suit 208 was even filed;

(vi) the legal manager of Prosper Group of Companies had offered to pay RM428,888 for 20 selected files even though they were time-barred. The legal manager, however, objects to the revision issuance of new bills. The matter has long passed, and the client

was unsure whether they could locate the files to verify such claims: L41, exh MAMH8, p 1522/PDF p 320; exh MAMH12, p 1547/PDF p 347; exh MAMH15, p 1573/PDF p 373. PW1 admitted that the plaintiff was aware of this position as early as 28 March 2018 before the filing of Suit 208. The defendant alleged that to circumvent limitations, the plaintiff raised fraud and conspiracy to injure;

(vii) taking this cue from the client, the plaintiff elected to reissue bills for the first 20 files and a further 16 additional files, which led to the defendant changing their position into a pleading limitation on all claims by the plaintiff;

(viii) the plaintiff was fully aware of this position before filing Suit 208. There is no loss of chance to recover from the plaintiff's client;

(ix) the defendant in support cited *Kumarappan @ Thannirmalai a/l KM Palaniappan v Kiranjit Kaur d/o Jagjit Singh (wakil diri Suresh Thanabalasingam) & Ors* [2022] MLJU 3389 (HC) that had applied the principles on the issue of causation of damages in loss of chance claims stated by the UK Supreme Court in *Perry v Raley Solicitors* [2019] UKSC 5 and by the Court of Appeal in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602, as follows:

> (vii) For a litigant to be successful in a claim against a professional for negligence, in a claim for loss of chance, it must be shown that the client had lost something of value or whether, on the contrary, his prospects of success in the original action were negligible'. I must also assess what would have been the plaintiff's prospects of success had the original litigation been fought out.
>
> (viii) The Court does not accept negligible claims, dishonest claims, or claims merely filed for nuisance purposes.

(e) the defendant also, in support, cited the Court of Appeal in *Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd* [2015] 1 MLJ 490 (CA), where it was observed that the plaintiff must show that the purported loss of chance must be real and substantial rather than merely negligible. It was argued further that the Court of Appeal in England and Wales in *Sharif and others v Garrett & Co (a firm)* [2002] 3 All ER 195, where the respondent firm of solicitors was sued in negligence when its client's case was struck out for want of prosecution. The court propounded a two-tier approach to the assessment of damages. Simon Brown LJ, speaking for the Court of Appeal, held as follows:

> [38] In stating the principles generally applicable to this class of case, I indicated in *Mount 11 Barker Austin (a firm)* [1998] PNLR 493 at 510, 511

a two-stage approach. First, the court has to decide whether the claimant has lost something of value or whether, on the contrary, his prospects of success in the original action were negligible. Secondly, assuming the claimant surmounts this initial handle, the court must then 'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation has been fought out'.

(f) the defendant argued that the claim by the plaintiff in Suit 208 has no chance of recovery based on the documents produced during the trial:

(i) the legal works for 24 out of the 36 files were carried out or completed earlier than 12 April 2012. The limitation would have been set in before the filing of Suit 208 on 13 April 2018;

(ii) the remaining 12 files had no supporting documents to establish the work done;

(iii) obviously, these invoices were prepared by the first to fourth defendant in Suit 208 before 2012 and would have been caught by limitation some time ago;

(iv) there were also files where no invoices were raised, or only draft invoices were not forwarded to Prosper Group of Companies;

(v) it was also argued that, after the 2016 re-issued bills, the plaintiff further re-issued them on 5 September 2017, claiming that the amount in the previous bills (before 2012 and the 2016 re-issued bills) was allegedly underbilled;

(vi) it was pointed out that essentially the difference in the computation of the legal fees for the value in excess of RM7.5m under the Solicitors Remuneration Order 2005 at the time. The remuneration of a solicitor concerning the non-contentious business is governed by the Solicitors Remuneration Order 2005 and, presently, the Solicitors' Remuneration Order 2023;

(vii) under the Solicitors Remuneration Order 2005, the fee scale is negotiable on the excess for consideration/adjudicated value of RM7.5m. From the earlier bills, it was negotiated at a lower rate (not at full rate). In the premise, there is no merit for the plaintiff to now claim for the full rate when it was not agreed upon by arguing that the previous bills were underbilled; and

(viii) the defendant drew the court's attention to unjustified bills (item 21) computed by the plaintiff using the Solicitors Remuneration Order 2005 unrelated to landed transactions. This was manifestly wrong and untenable;

(g) the defendant argued that the plaintiff had not lost any chance to recover the alleged claims in Suit 208 as this right was preserved by a consent

order dated 21 August 2018 in Kuala Lumpur High Court Suit No WA-22NCVC-200–04 of 2017 (Suit 200) entered by Susie Lim (who was a defendant in Suit 208). The plaintiff failed to prove that the present suit is not substantively similar to the earlier suits:

(i) Susie Lim, a former partner of the plaintiff, was the partner in charge of files concerning the impugned client. The partnership between Dato Mohamad Amin and Susie Lim soured, and the former sued Susie Lim in Suit 200 on 21 April 2017 over Susie's alleged neglect and failure to collect from the impugned client for the sum of RM428,888;

(ii) a settlement agreement was reached, and a consent order was recorded, in which parties agreed to audit the files and each party's entitlement. The uncollected fees from this impugned client would have been included in the proposed audit: CBOD Part B *Jld* 1, pp 173–174; pp 178–183; NOP p 249, lines 24–27 where PW1 agreed that the settlement agreement would also facilitate the audit of the Prosper Group of Companies files;

(iii) in her affidavit in Suit 208, Susie Lim averred on the duplication of the relief sought in Suit 200, where a consent order had been recorded, concerning Suit 208: CBOD Part B, *Jld* 3, pp 70–72. PW1 corroborated this: NOP, p 265, lines 12–17. No evidence by the plaintiff has been shown that any action has been taken on the said consent order and Settlement Agreement for recovery purposes. In these circumstances, the issue of loss of chance is untenable; and

(iv) the plaintiff failed to prove they suffered damages from the defendant's alleged breach;

(h) the defendant argued that if the court finds there is negligence on the part of the defendant, it was asserted that the chain of causation was broken (*novus actus interveniens*) by the plaintiff in withdrawing the appeals on the EOT and reinstatement:

(i) the defendant claimed that upon realising, they failed to file further and better particulars as contained in the consent orders. They immediately filed for an EOT on 19 November 2018, with further and better particulars filed simultaneously;

(ii) L71 was dismissed by the court 18 April 2019;

(iii) the defendant advised the plaintiff to appeal to the Court of Appeal against the dismissal;

(iv) on 15 May 2019, the plaintiff discharged the defendants and acted in person;

(v) on 17 May 2019, the plaintiff filed an appeal on their own against the dismissal of L71 vide Civil Appeal No W-02(IM)(NCVC)-990–05 of 2019 (Appeal 990);

(vi) the plaintiff failed to attend case management for the appeal on 16 July 2019, 27 August 2019, and 10 September 2019. The memorandum and the record of appeal were not filed;

(vii) on 14 November 2019, Appeal 990 was withdrawn;

(viii) instead of proceeding on the appeal, PW1 gave evidence that a senior counsel (without naming who or called to offer evidence at the trial) advised the plaintiff to file a reinstatement application: NOP, p 322, lines 28–37, p 323, line 2;

(ix) the court dismissed the reinstatement application by the plaintiff;

(x) the presiding judge in the High Court noted in his written grounds if Appeal 990 was allowed by the Court of Appeal, the plaintiff would be granted an extension of time to comply with the consent orders: CBOD, Part B *Jld* 10, pp 209–2018. This notwithstanding, the plaintiff on their own still proceeded to withdraw Appeal 990 on 14 November 2019. Otherwise, there is a good possibility for the dismissal of the EOT to be reversed by the Court of Appeal, as the merits of the case have not been canvassed and ventilated. PW1 confirmed this in her evidence: NOP, p 321, lines 20–35;

(xi) the defendant cited O 1A and O 2 r 1 of the RC 2012 that the overriding interest in any matter is the predominant interest for justice: *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645 (FC) observed that the rules should not so besotted a judge that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the law and the cold letter of the law. The defendant also cited the Court of Appeal observation in *Ong Mei Lean v Loh Sim Seng* [2021] MLJU 2082 (CA), that the court has the discretion to extend time under O 3 r 5, O 42 r 6(1) read together with O 45 r 6(1) and O 92 r 4 of the RC 2012;

(i) res judicata does not apply in the circumstances of the present case, as the court has not definitively determined the merits of this claim. The consent orders are not the final order on the merits of the present suit. In *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 (HC), it was held that the issues raised at the interlocutory stage are not res judicata and may be taken at the

substantive stage. This position has been affirmed by the Supreme Court in *Perumahan Farlim (Pg) Sdn Bhd & Ors v Cheng Hang Guan & Ors* [1989] 3 MLJ 223 (SC).

In the circumstances, the plaintiff failed to discharge its burden, and their action must be dismissed with costs.

THE LAW

[7] The burden of proof in establishing its case is on the plaintiff. It is not the defendant's duty to disprove it. The evidentiary burden is trite that those who allege a fact are duty-bound to prove it (see ss 101, 102, and 103 of the Evidence Act 1950):

(a) *Selvaduray v Chinniah* [1939] 1 MLJ 253 at p 254 (CA) held:

> The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and accordingly, the plaintiff must establish his case. If he fails to do so, it will not avail him to turn around and say that the defendant has not established his. The defendant can say it is wholly immaterial whether I prove my case or not. You have not proved yours.

(b) *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 (FC) held:

> It was all a matter of proof and that until and unless the plaintiff has discharged the onus on her to prove her case on a balance of probabilities, the burden did not shift to the defendant, and no matter if the defendant's case was completely unbelievable, the claim against him must in these circumstances be dismissed. With respect, we agree with this judicial approach.

[8] Negligence in a nutshell:

(a) the tort of negligence requires proof of specific elements before it is established, despite carelessness on the part of the defendant and injury or damage sustained by the plaintiff. In *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781, Alderson B said:

> ... that negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do.

(b) to establish negligence, *three elements must be fulfilled*:

(1) there is a *duty of care* on the part of the defendant;

(2) the defendant *breaches this duty*; and

(3) the breach *causesdamage* to the plaintiff, although these elements are not necessarily exclusive of the other at all times;

(c) the cause of action for negligence arises on the date the plaintiff suffers the loss: *Bank Bumiputra Malaysia Bhd lwn Tetuan Wan Marican Hamzah & Shaik & Lain-Lain* [1994] 1 MLJ 124 (HC);

(d) duty of care on the part of the defendant.

(i) the objective test used in determining the existence of a duty of care is the neighbour principle;

(ii) the neighbour principle was introduced by Lord Atkins in *Donoghue v Stevenson* [1932] AC 562 (HL) in short:

(1) the rule that you are to love your neighbour becomes in law; you must not injure your neighbour;

(2) you must take reasonable care to avoid acts or omissions you reasonably foresee would likely injure your neighbour; and

(3) a neighbour-in-law seems to be so closely and directly affected by my act or omission that I ought reasonably to contemplate them as being so affected when I direct my mind to the acts or omissions in question.

(e) the neighbour principle is based on *an objective test* in that the court will seek to determine hypothetically whether a reasonable man, in the same circumstances as the defendant, foresees that his conduct will adversely affect the plaintiff:

(i) if the determination is negative, the plaintiff is not a neighbour of the defendant, and no duty of care arises; and

(ii) if it is affirmative, the plaintiff is a neighbour of the defendant, and the latter owes a duty of care.

[9] Breach of this duty of care:

(a) as said by Alderson B in *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781:

(i) negligence is the omission or refusal to do something that a reasonable man would do;

(ii) a breach of duty is determinable through the reasonable man test. The question is: Would a reasonable man have acted as the defendant had done if the reasonable man faced the same circumstances as the defendant? and

(iii) the standard of care required is not that of the defendant himself but of this 'reasonable man';

(b) in the *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103 (FC), held that in considering whether or not the defendants were in breach of their duty of care, it was necessary to consider whether the risks of injury to the plaintiff were reasonably foreseeable. Assuming it was, the next question was whether the defendants had taken reasonable steps to protect the plaintiff against those risks;

(c) in *Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors* [1981] 2 MLJ 27 (FC), the Federal Court distinguished from *Jumat's* case, held the defendants negligent as they had failed to take reasonable steps to prevent injury to the plaintiff under their care; and

(d) the factors the court considers in determining the required standard of care are varied. *The standard of care is a question of law, but a finding that the defendant has met or has not met that standard is a matter of fact*.

[10] The breach causes damage to the plaintiff:

(a) the evidence adduced at trial on the defendant's conduct must satisfactorily establish that it had caused the alleged damage/injury to the plaintiff;

(b) the 'but for' test of causation produces an all-or-nothing result. The defendant is liable if the plaintiff did not suffer injury but for the defendant's negligence. The neglect of the defendant must have been a necessary condition to occasion the injury or harm: *Dr Guan Suk Chyn v Kartar Kaur a/p Jageer Singh* [2014] 1 AMR 200 (CA); *Ngan Siong Hing v RHB Bank Bhd* [2014] 2 MLJ 449 (CA):

(1) the first step in establishing causation (but for) is to eliminate irrelevant causes;

(2) the court is not concerned with identifying all the possible causes of the incident;

(3) only the effective cause of the damage caused is of concern; and

(4) would the damage have occurred but for the defendant's negligence?

(c) the Court of Appeal ruled in *Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals* [2013] 2 MLJ 29 (CA) that in an action for negligence, the plaintiff must establish:

(1) the defendant's action was the effective cause of the injury suffered by the plaintiff;

A (2) there must be a causative link between the wrongdoing and the damage/injury caused; and

(3) the plaintiff's claim must fail without a causative link.

B The Federal Court in *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 (FC) ruled that the plaintiff's claim for negligence could not succeed for failing to establish the 'cause and effect' of the death of the fish in the river. There was no positive proof that the discharge from the defendant's mine had anything to do with the death of the fish. There was only a possibility.

C

FINDINGS

[11] I have examined all-cause papers, the evidence at the trial, and the parties' respective submissions in canvassing for their position in the present D suit. Considering the parties' arguments in paras [5] and [6], on the balance of probabilities, I am unpersuaded by the position taken by the plaintiff in attempting to establish its claim. All things considered; it is my considered judgment that:

E

(a) the plaintiff has failed to discharge its burden of proof to establish the claim set out in its SoC as stipulated under ss 101–103 of the Evidence Act 1950. As I had observed, the plaintiff had failed to adduce the required compelling evidence to tilt the scale of evidence in its favour;

F

(b) it is trite in law that the plaintiff shoulders the burden of proof in establishing its case. It is not the defendant's duty to disprove it. The evidentiary burden is that those who allege a fact are duty-bound to prove it (see ss 101, 102, and 103 of the Evidence Act 1950).

G

See: *Selvaduray v Chinniah* [1939] 1 MLJ 253 at p 254 (CA); *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 (FC).

H

(c) it is trite that:

(i) in cases involving a professional duty of care, the standard of negligence differs from that of a general duty of care. It is the practice in this genre of cases that a relevant expert in the field needs to be called to establish I the minimum bar for the standard of care applicable to professionals to enable the court to determine from the evidence adduced at the trial that the defendant had failed to meet that professional bar for the standard of care expected of a professional or in the case a practising legal practitioner;

(ii) the parties do not dispute that the present case concerned an allegation of breach of professional duty of care. In such circumstances, the 'Clapham Omnibus' reasonable man test will not apply, as that is the test for general negligence, not professional negligence. There is already a plethora of authorities on this point of law;

(iii) when it involves professional negligence, the standard of care must be adjusted to fit the occasion. The Federal Court in *Swamy v Mathews & Anor* [1968] 1 MLJ 138 (FC) ruled that a man or woman in a professional profession is bound to exercise the skill and care of an ordinary competent practitioner in that profession, be it an accountant, a banker, a doctor, a solicitor or otherwise;

(iv) in professional negligence, there is a fourth requirement:

(1) the duty of care was owed to the plaintiff;

(2) there was a breach of that duty;

(3) that the plaintiff suffered actual damages; and

(4) the fourth requirement that must be pleaded and established can seen in *Arthur JS Hall & Co (a firm) v Simmons Barrat* [2002] 1 AC 615, where it was observed that the standard of care to be applied in negligence against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercise in judgment have to be made in often difficult and time constrained circumstances. *It requires that a plaintiff show that the error was one that neither reasonably competent member of the relevant profession would have made. This is an essential element of protection against unjustified liabilities.*

[12] It is my considered judgment, anchored on the preceding principles by the appellate and the Apex Court (*Selvaduray v Chinniah* [1939] 1 MLJ 253 at p 254 (CA); *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 (FC)) that:

(a) all things considered; the plaintiff failed to discharge its burden of proof by a greater weight in evidence that had tilted the scale in the defendant's favour. The materials adduced do not establish sustainability in the present suit;

(b) it is my observation that even though s 68(1)(b) of the CJA 1964 states that no appeal shall be brought to the Court of Appeal where the judgment or order is made by consent of parties, it did not spell the end of the purported recovery process against the defendants named in Suit 208:

(1) it is trite law that unless and until the claim is disposed of on the case's merits, there is no bar or encumbrance for the plaintiff to file a fresh action on substantially similar grounds against the named defendants in Suit 208. There is no loss of chance for attempted recovery, if at all. Concerning the consent orders with the unless order, I observe that it does not prohibit refiling the action. Section 3 of the Courts of Judicature Act 1964 makes it clear that 'decision' means judgment, sentence or order but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties. Finality on the merits and issues of the plaintiff's claim in Suit 208 has neither been canvassed nor ventilated. I am guided by *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645 (FC), the rules should not so besotted a judge that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the law and the cold letter of the law. The Court of Appeal observation in *Ong Mei Lean v Loh Sim Seng* [2021] MLJU 2082 (CA), leaves no doubt that the Court has the discretion to extend time under O 3 r 5, O 42 r 6(1) read together with O 45 r 6(1) and O 92 r 4 of the RC 2012. The Rules of the Court made it clear that the overriding interest in any matter is the interest in justice and fairness;

(2) in the circumstances, the plaintiff cannot claim they have exhausted all their legal resources in pursuing the named defendants in Suit 208;

(3) by the same token, res judicata, as argued by the plaintiff, cannot be said to apply to bar refiling an action to attempt recovery against the named defendants in Suit 208. To submit that any refilling of the action is barred by res judicata as the plaintiff did is untenable. Res judicata cannot set in when a final determination on the merits of the claim has not been thoroughly canvassed and ventilated. I find that the consent orders are not the final order on the merits of the present suit. As cited by the defendant, *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 (HC), held that the issues raised at the interlocutory stage are not res judicata and may be taken at the substantive stage, and had been affirmed by the Supreme Court in *Perumahan Farlim (Pg) Sdn Bhd & Ors v Cheng Hang Guan & Ors* [1989] 3 MLJ 223 (SC).

[13] In my considered judgment, to allow the plaintiff to recover the speculated value of RM2.1m contingent upon the successful recovery from the named defendants in Suit 208 against the defendant in the present suit is, at

this juncture, wholly misplaced when the full legal avenue has not been exhausted against the named defendants in Suit 208:

(a) the plaintiff cannot use the present action as a shortcut and an effortless route to recovery when the recovery process against the named defendants in suite 208 has not even been canvassed and ventilated on its merits; and

(b) in the premise, I find no compelling evidence that the plaintiff has suffered damage and losses caused by the defendant's alleged actions at this juncture. I take cognisance of the ruling in *Kuwait Finance House Malaysia Bhd v Obnet Sdn Bhd & Ors and another suit* [2016] MLJU 1843; [2016] 1 LNS 1116 that when it clearly leads to a conclusion that what was argued are merely afterthoughts, it is to be disregarded by the court.

[14] I am also guided by:

(a) the Court of Appeal in *Malayan Banking Bhd v Tan Soek Phee & Ors and another appeal* [2023] 5 MLJ 507; [2023] CLJU 1555 (CA), concerning appeals against the trial judgment of the High Court in partially allowing the claim relating to solicitor's negligence and loss of chance. In that case, in a nutshell:

(i) the plaintiff provided banking loan facilities to CSPM Technology Sdn Bhd (borrower), which were personally guaranteed by Chin Kwong Wah and Ng Lee Eng ('guarantors');

(ii) in default of the loan, Messrs Abdul Aziz Chen was instructed to take recovery proceedings (KLHC D3-22–43 of 2008: Suit 43) against the borrower and (Penang HC No 22–162 of 2004: Suit 162) against the guarantors;

(iii) Suit 43 against the borrower was dismissed after a full trial, and its appeal to the Court of Appeal was struck off (for want of prosecution) for Messrs Abd Aziz Chen's failure to file the appeal record within the prescribed time. Messrs Abd Aziz Chen also failed to reinstate Suit 43 within the limitation period. The borrower was eventually wound up on 5 November 2015; and

(iv) the plaintiff took legal action against the defendants (KLHC WA-22NCVC-314–05 of 2016 (suit), premised on professional negligence, claiming a refund of all legal fees, damages for loss of chance/opportunity, and other damages;

(b) High Court held:

(i) though the plaintiff failed to call an expert witness (professional

negligence), the HC found the defendants liable for professional negligence for failing to file the appeal record timely and for failing to prosecute Suit 162 against the guarantors and file for its reinstatement before limitation set in. The HC held:

(1) all legal fees are to be refunded;

(2) the court found the defendants not liable for damages for loss of chance/opportunity because the plaintiff failed to prove losses, and the plaintiff could still reinstitute a new suit against the guarantors at the material time. The learned High Court judge did not award damages for loss of a chance/opportunity because the plaintiff could, at best, recover only nominal damages from the borrower that was in liquidation;

(3) reliance was made on *Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd* [2015] 1 MLJ 490 (CA) wherein Hamid Sultan Abu Backer JCA held as follows with emphasis added:

> [9] In addition, it must be noted when a matter is struck out, there will be at least two types of damages for the client. One is actual damage for costs to reinstate or refile, inclusive of instructing new solicitors to take the conduct of the matter as the case may be, and the other is the 'loss of chance to sue'. To say 'actual damage' will not arise upon the case being struck out is a fact quite difficult to comprehend. However, on the second part of 'loss of chance', there will not be any liability if there is no actual loss and/or reasonable prospect of success as advocated in the submission of the appellant.

(c) the Court of Appeal held:

(i) it is guided by *Nor Azlina bt Abdul Aziz v Expert Project Management Sdn Bhd* [2017] 3 MLJ 763; [2017] 5 CLJ 58 (CA) observed that:

> [20] Nevertheless, there are occasions when appellate interference is warranted, and these occasions have been well set out in numerous cases. Some of these occasions are:
>
> (a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forestry, Sabah & Anor v Mau Kam Tong & Ors and another appeal* [2010] 3 MLJ 509; [2010] 3 CLJ 377);
>
> (b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Brothers Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1; [2009] 6 CLJ 626);
>
> (c) where the decision arrived at by the trial court was without a judicial appreciation of the evidence (see *Gan Yook Chin & Anor v Lee Ing Chin & Ors*

[2005] 2 MLJ 1; [2004] 4 CLJ 309);

(d) where a trial court has so fundamentally misdirected itself that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v Sri Seltra Sdn Bhd* [2008] 2 MLJ 87; [2008] 2 CLJ 284);

(e) where the trial judge was plainly wrong in arriving at his decision (see *Lee Ing Chin & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19);

(f) Where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see *First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd* [2013] 4 MLJ 693; [2013] 1 LNS 625 which followed the Privy Council case of *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165; [1984] 1 LNS 40); and

(g) where the judgment is based upon a wrong premise of fact or of law (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416).

(d) liability:

(i) on the issue of liability, the CA relied on *Suresh a/l Subramaniam v Majlis Perbandaran Selayang* [2023] MLJU 2051; [2023] MLRAU 108 (CA) that had referred to and followed *Malayan Banking Bhd v Tan Soek Phee & Ors and another appeal* [2023] 5 MLJ 507; [2023] CLJU 1555 (CA):

[7] There are authorities to suggest that in a case of this nature, the respondent still has to prove his case against the third party on the balance of probabilities. This was not done in this case. In *Sharif and others v Garrett & Co (a firm)* [2002] 3 All ER 195, *the court with similar issues had relied on Lord Justice Simon Brown* in *Mount v Barker Austin* [1998] PNLR 493 at pp 510–511, where His Lordship had summarised the relevant consideration as follows:

(i) The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim, he has lost something of value, ie, that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success.

(ii) The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client so that he lost nothing by their negligence in causing it to be struck out. Plainly, the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence), such advice is likely to be highly relevant.

(iii) If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim than it would have had at the time of the original action, such difficulty should not count against him but rather against his negligent solicitors. It is quite likely that the delay would have caused such difficulty and quite possible, indeed, that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case.

(iv) If and when the court decides that the plaintiff's chances in the original action were more than merely negligible, it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking, one would expect the court to tend towards a generous assessment, given that it was the defendants' negligence that lost the plaintiff the opportunity of succeeding in full or in fuller measure.

(e) expert witness:

(i) the Court of Appeal took the position that:

(1) the CA case in *Shearn Delamore & Co v Sadacharamni a/l Govindasamy* [2017] 1 MLJ 486 as well as *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207; [2017] 6 CLJ 368 that ruled it was fatal to the plaintiff in limine by its failure to call a practising solicitor to testify as expert witness at the trial to establish the requisite standard of care of a solicitor in ascertaining the prospect of success of the original case is distinguishable to the case before it;

(2) the alleged breach pertained to non-contentious intellectual property and conveyancing solicitor's practice, respectively;

(3) as to contentious advocate's litigation practice, there is no necessity for expert evidence of a practising advocate to apprise the court because the court is equally well placed to independently appraise and evaluate the requisite standard of care of an advocate: see *Wong Kim v Loh Kim Foon* [2003] 4 MLJ 535;

(4) the CA in *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380 observed:

> [64] On the need to call expert evidence, we are of the view that in our instant case, the fact that no expert was called to give evidence on the standard of care is not fatal. The case of *Shearn Delamore* and *Tetuan Theselim Mohd Sahal* has to be distinguished. S*hearn Delamore* is a case on intellectual property, and the case of *Tetuan Theselim Mohd Sahal* involves an SPA. Both these cases on intellectual property and conveyancing require an expert to be called to establish the standard of care required or expected from competent practitioners practising in

> those specialised fields to establish whether the standard of care has been breached. In our instant case, it is a simple case. It pertains to the duty of a practitioner to inform and advise the client of the consequence of non-payment of SFC, which would result in the case being struck off. It involves the duty of the practitioner to be diligent, to ask for an extension of time if time has expired, and foremost, to inform the client of the prospect of success of the client's case and not lead the client on and when the case got struck off to turn the table against the client by alleging that the case has no prospect or chances of winning after all.

(f) the Court of Appeal determined that:

(i) on the materials before it, the High Court had not misdirected itself that the defendants were professionally negligent. The omissions committed by the firm of Messrs Abd Aziz Chen are plainly inexcusable advocate's carelessness, resulting in the plaintiff losing the opportunity to claim, which is not negligible against the borrower and guarantors;

(ii) the High Court's finding that the plaintiff could reinstitute the suit against the borrower and the guarantors is not tenable since the action has been impaired by limitation, and the plaintiff thereby lost its opportunity to claim against them; and

(iii) the Court of Appeal was satisfied that the plaintiff had a reasonable prospect of success against the borrower and guarantors in both Suit 43 and Suit 162 because they are straightforward loan recovery cases, thereby allowing the plaintiff's claim for damages for loss of chance/opportunity.

[15] Grounded on the principles in *Malayan Banking Bhd v Tan Soek Phee & Ors and another appeal* [2023] 5 MLJ 507; [2023] CLJU 1555 (CA) it is my considered determination that:

(a) based on the materials before me, as produced by the plaintiff, who is duty-bound to prove its losses, I am unconvinced of the compelling value of the evidence. The prospect of recovery from those files and materials is negligible. Limitations and contentious legal impairment encumber the attempted recovery. I take guidance from the Court of Appeal in *Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd* [2015] 1 MLJ 490 (CA), that the plaintiff must show that the purported loss of chance must be real and substantial rather than merely negligible. I take cognisance of the approach of the Court of Appeal (England & Wales) in *Sharif and others v Garrett & Co (a firm)* [2002] 3 All ER 195, that the principles applicable generally are:

(i) the court has to decide whether the claimant has lost something of

value or whether, on the contrary, his prospects of success in the original action were negligible; and

(ii) assuming the claimant overcomes this initial hurdle, the court must then 'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out';

(b) that said, there is no impediment to the plaintiff in reinstituting the civil suit for recovery against the named defendants in Suit 208 on the assertion of fraud, but the law is clear that merely alleging fraud and proving it are two distinct issues. Unlike in *Malayan Banking Bhd v Tan Soek Phee & Ors and another appeal* [2023] 5 MLJ 507; [2023] CLJU 1555 (CA), the issue of limitation was occasioned by the omission of the defendants, in contrast, the limitation in the present case had already set in before Suit 208 was instituted. However, if the plaintiff can establish actual fraud, it would mitigate the limitation issue in the new filing.

(c) I find that the losses claimed by the plaintiff are purely speculative. Unlike in *Malayan Banking Bhd v Tan Soek Phee & Ors and another appeal*, where it was founded on a straightforward loan recovery basis. That is where, in my determination, the plaintiff failed to convince the court of the damage they allegedly suffered that can be attributed to the defendant. It is a trite law that the court will not act on speculation but only on proven facts. In the circumstances, there can be no shortcut to civil recovery;

(d) with that burden undischarged, there can be no finding in favour of the plaintiff's claim. I am guided that the plaintiff is duty-bound to prove recoverable losses before an award of damages can be made: *Penang Port Commission v Kanawagi s/o Supramaniam* [1996] 3 MLJ 427; *Supramaniam a/l Kasia Pillai v Subramaniam a/l Manickam* [2017] MLJU 1590 (CA) that had also observed that the burden of proof is always on the party asserting the claim for damages and that legal burden can only be satisfied when evidence had reached a standard of establishing a prima facie case for the disputing party to rebut. If that evidence had not established a prima facie case, failure to rebut would not amount to having proved its case.

[16] I believe:

(a) that it is an error in judgment for the plaintiff to pre-empt the Court of Appeal's position on the Appeal 990, by not prosecuting it to its conclusion;

(b) the evidence is clear that the plaintiff filed and withdrew the appeal on the advice of an unnamed supposed senior counsel who was not called to

offer evidence or be examined on the advice given; and

(c) it has nothing to do with the defendant, who had been discharged then. In that respect, the plaintiff is also the architect of its failure.

CONCLUSIONS

[17] In short, by and large:

(a) from the facts, the totality of the evidence at the trial, and the respective submissions of the parties, it is my considered view that the scale of evidence tilted in the defendant's favour; and

(b) accordingly, the plaintiff's claim is dismissed, and costs of RM25,000, to be paid to the defendant within 30 days from the date of this order.

Plaintiff's claim dismissed with costs of RM25,000 to be paid to defendant within 30 days from date of order.

Reported by Dzulqarnain Ab Fatar